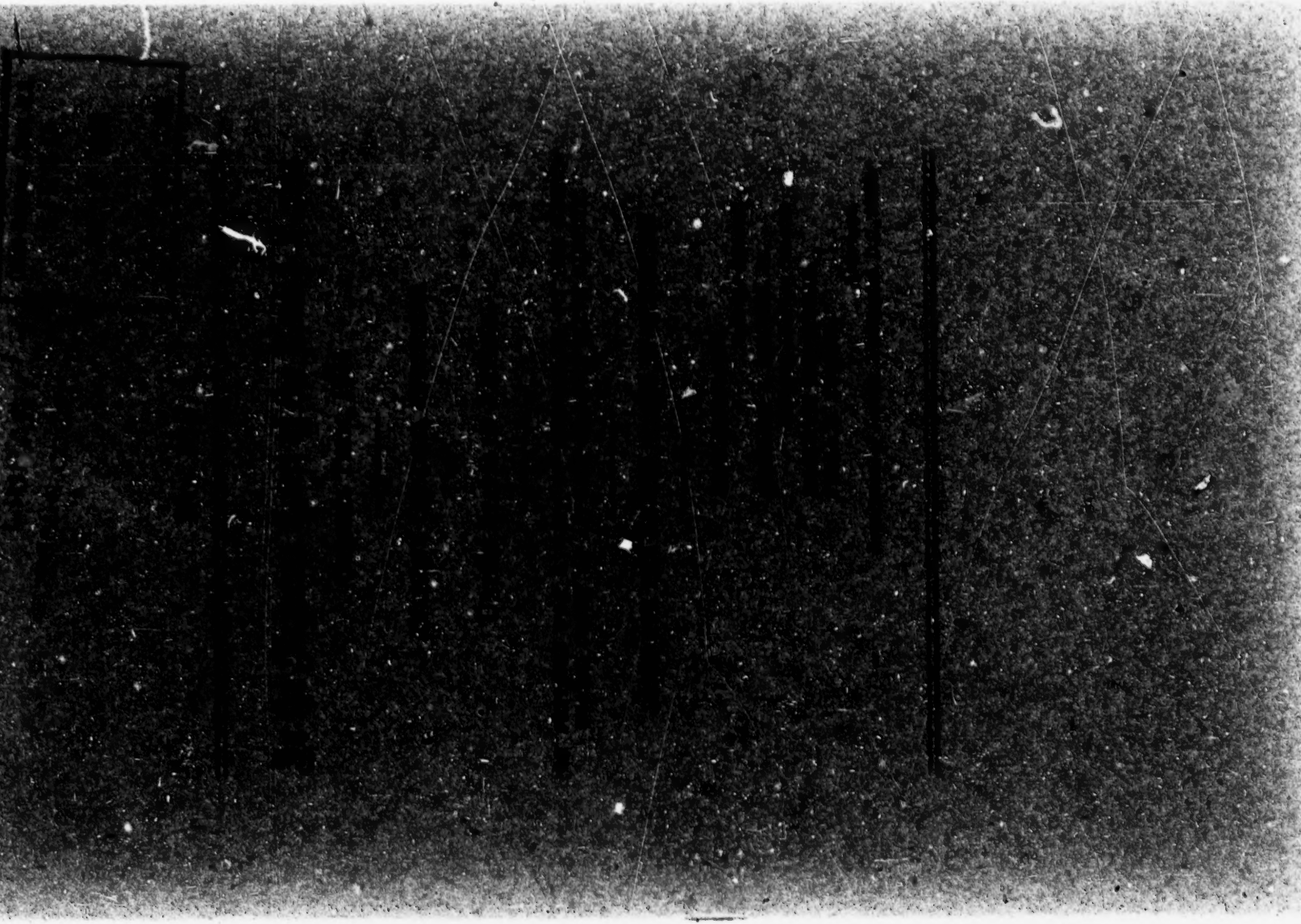

INDEX

Opinion below
Jurisdiction
Question presented
Statement
Argument
Conclusion

CITATIONS

Cases:

Machibroda v. United States, 368 U.S. 487
Sanders v. United States, 373 U.S. 1

Statutes:

18 U.S.C. 371
18 U.S.C. 2113
28 U.S.C. 2255

Page
1
1
1
2
5
8

6, 7
5, 6

2
2
5

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 163

ANTHONY ORLANDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 327 F. 2d 185.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1964. A petition for rehearing was denied on March 3, 1964 (Pet. App. B). On June 1, 1964, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including June 8, 1964, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly denied summarily petitioner's motion to vacate sentence.

STATEMENT

1. In November 1958, petitioner and three codefendants—Jalove, Brinegar and Thornton—were charged in the United States District Court for the Eastern District of Kentucky with conspiracy and the substantive offense of aggravated bank robbery, in violation of 18 U.S.C. 371 and 2113 (App. 24a).[1] At arraignment before Judge Swinford on January 19, 1959, petitioner and Jalove, represented by the same retained counsel (see App. 11b), entered pleas of not guilty (App. 2b–7b). The court appointed counsel for the other two defendants and set the trial date for March 11, 1959.

On March 11, after the jury had been impaneled and sworn, Judge Swinford was advised that petitioner and Jalove desired to withdraw their pleas of not guilty and enter pleas of guilty. Petitioner personally assured the court that it was his wish to plead guilty to both counts of the indictment, and that he was doing this of his own free will (App. 9b–11b). The trial proceeded against Brinegar and Thornton.

On the following day, petitioner and Jalove filed motions to withdraw their pleas of guilty. Judge Swinford heard counsel on these motions on March 13, 1959, after the jury had retired to consider the case against Brinegar and Thornton (App. 14b). Counsel indicated that petitioner and Jalove had once again changed their positions and now pre-

[1] Record references are to the appendices to the briefs in the court of appeals—the small notation "a" following the page number referring to the Appellant's Appendix, and "b" to the Government's Appendix.

ferred to stand on their guilty pleas with respect to the substantive count since they "felt without any question," that they were guilty of the charge (App. 15b). He said that they felt, however, that a not guilty plea would be warranted as to the conspiracy count since they had not carefully thought out and planned the robbery in advance (App. 14b–15b). Petitioner and Jalove personally assured the court, in response to inquiry, that each desired to stand on the guilty plea to the substantive count (App. 15b). The court expressed some doubt as to whether the defendants understood the meaning of conspiracy, and a discussion on the subject followed among the court, government counsel and Jalove (App. 16b–18b). Jalove then admitted that he and petitioner had conspired "through ignorance." Petitioner and Jalove thereafter again entered a plea of guilty to both counts of the indictment, and counsel withdrew the motion to change the pleas of guilty (App. 18b–19b).

The jury returned a verdict of guilty as to Brinegar and Thornton, and the four defendants appeared before Judge Swinford for sentencing (App. 11b). Petitioner's counsel addressed the court and the court then asked petitioner if there was anything he wished to say (App. 12b). Petitioner answered, "No sir" (App. 13b).

The court observed that petitioner had the most serious criminal record of all the defendants (having been before a court on about thirty different occasions). It also noted that it was petitioner who, together with Jalove, had put in jeopardy the lives of persons in the bank, and it sentenced petitioner

to imprisonment for five years on the conspiracy count and twenty-five years on the substantive count, the terms to run concurrently (App. 13b).

2. On October 15, 1962, some $3\frac{1}{2}$ years after his conviction, petitioner filed a motion to vacate or correct the twenty-five year sentence and to have it reduced to fifteen years (Supp. App. 1a). The motion alleged that petitioner's plea of guilty was induced by his "court-appointed" counsel who informed him that the United States Attorney had guaranteed that his sentence would not exceed fifteen years, but that it would be thirty years if he did not plead guilty. The motion also alleged that the court failed to give petitioner an opportunity to speak before or after sentence, and that, if given the opportunity, petitioner "would truthfully have answered that he was pleading guilty in reliance upon his court-appointed attorney's representations" (Supp. App. 2a). Further allegations were made that petitioner was improperly denied (1) a continuance to employ other counsel, (2) a change of venue, and (3) a transcript of the record (Supp. App. 2a–3a). Petitioner requested a hearing "at which he may have witnesses called in his behalf" and that he be produced at the hearing to testify (Supp. App. 4a).

On October 25, 1962, Judge Swinford denied the motion, without a hearing, finding that the record, including the transcript of arraignment and sentence, clearly showed it to be "entirely without merit" (App. 5a). No appeal was taken from the denial.

3. On December 21, 1962, petitioner filed the present motion to vacate sentence (App. 7a). He alleged

that his sentence of twenty-five years should be reduced to fifteen years because his plea of guilty had been induced by misrepresentation and as a result of an agreement between his attorney and the United States Attorney (App. 8a, 11a). He explained that a "few months prior to trial", his counsel advised him that he had been able to make a deal with the United States Attorney that would effect a disposition of all petitioner's difficulties and that petitioner understood that if he would plead guilty the maximum sentence imposed would not exceed fifteen years (App. 11a-12a). He stated that he could substantiate his allegations by four named witnesses—the codefendants Juiove and Brinegar, his attorney, and the United States Attorney—and by two unnamed additional witnesses (App. 11a).

Judge Swinford overruled the motion on the ground that 28 U.S.C. 2255 did not require that he entertain a second successive motion for the same relief (App. 15a). The court of appeals affirmed (Pet. App. A).

ARGUMENT

Both courts below properly held that the district court was not required to entertain petitioner's motion under 28 U.S.C. 2255 presenting again an issue previously considered and ruled upon by the district court.

In *Sanders* v. *United States*, 373 U.S. 1, this Court held that "controlling weight" may be given to the denial of a prior application under 28 U.S.C. 2255 if (1) the same ground presented in the subsequent application was determined adversely to the applicant

on the earlier application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the second application. 373 U.S. at 15. This threefold test was met in the present case: (1) The basis for relief in the second application—the assertion that petitioner's plea was induced by the United States Attorney's promise of a light sentence—was essentially the same as that urged in the previous application. (2) The district court, on consideration of the first application, had determined that the files and records showed the claim to be entirely without merit, and no appeal was taken from this decision. (3) The records showed not only that petitioner had assured the court that he was entering his plea voluntarily, but that his contention that he would have disclosed the alleged agreement if he had been given an opportunity to speak was totally false. The records also showed that the attorney who allegedly relayed the promise of a light sentence was counsel of petitioner's own choosing, not "court-appointed" counsel. The circumstances of petitioner's plea, considered as a whole and in light of the demonstrated falsity of some of his allegations, certainly do not suggest that any injustice was perpetrated.

Nor, as the court of appeals observed, were petitioner's factual allegations substantial enough to require a hearing. In *Machibroda* v. *United States*, 368 U.S. 487, this Court expressly noted that a petitioner was not necessarily entitled to a full hearing on every factual issue regardless of "how vague, conclusory or palpably incredible his allegations may be."

368 U.S. at 495. In that case, which was thought to be "not far from the marginal * * * line," 368 U.S. at 496, the Court observed that petitioner's assertions were "detailed and specific" as to time, place and circumstances of the alleged promise (368 U.S. 489, 495, 496), and, while improbable, could not be termed incredible (368 U.S. 496). By contrast, petitioner's assertions in this case lack specificity and are incredible in light of this record. The record shows that petitioner thought of withdrawing his plea of guilty to the conspiracy count, a move which would have been completely meaningless if he believed that he had a guarantee of a fifteen-year sentence.[2] In addition, petitioner's allegation that witnesses could corroborate his story conflicts with his basic factual contention that a "deal" was privately made between his attorney and counsel for the government. Finally, petitioner's allegations were first made $3\frac{1}{2}$ years after sentence, a delay which would hardly have been tolerable if petitioner's version of the facts were at all truthful. As this Court noted in *Machibroda*, 368 U.S. at 495, the statute "does not strip the district courts of all discretion to exercise their common sense," and the district court's exercise of that discretion in this case eminently warranted its conclusion.

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[2] It is also improbable that the government, which was proceeding with trial against his co-defendants, would be eager to forego trial as to petitioner since he, the most seasoned of the four criminals, was one of those who entered the bank and upon whose person stolen money was found.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1964.